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No. 81-2218

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES *ex rel.* JAKE LAPIN,
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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Dated: June 30, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

The False Claims Act, 31 U.S.C. §§ 231 *et seq.*, permits individuals to bring *qui tam*, or informer, suits to recover on behalf of the United States damages and penalties on account of false claims made against the United States. That Act provides, however, that the federal courts are without jurisdiction to proceed with any *qui tam* suit "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States . . . at the time such suit was brought . . . ." 31 U.S.C. § 232(C). The question here presented is:

Whether the False Claims Act deprived the district court of jurisdiction over this *qui tam* action where it appeared that before bringing suit the *qui tam* plaintiff had disclosed to the federal government all the evidence and information upon which his suit was based.*

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* Respondent International Business Machines Corporation has no parent company and numerous wholly-owned subsidiaries. It is, indirectly, the owner of an interest in Discovision Associates. Minor percentages of the stock of some of its other subsidiaries are held by other shareholders. Those subsidiaries are: International Business Machines of Belgium S.A., IBM European Office (Brussels) S.A., Compagnie IBM France, S.A., Cie, IBM Madagasikara, S.A., IBM Europe, S.A., IBM Southern Area Development, S.A., IBM Trade Development, S.A., IBM Ireland Limited, IBM Israel Ltd., IBM Italia, S.p.A., Companhia IBM Portuguesa, S.A.R.L., IBM Argentina, S.A., IBM do Brasil-Industria, Maquinas e Servicos Ltda., IBM de Costa Rica, S.A., IBM de Honduras, S.A., IBM de Mexico, S.A., IBM de Panama, S.A., IBM Philippines, Incorporated, IBM Thailand Company Limited, and IBM de Exportacion y Servicios, S.A.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
ARGUMENT	4
CONCLUSION	5

TABLE OF AUTHORITIES

Cases:	Page
Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668 (9th Cir. 1978)	4, 5
Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979)	4
United States v. Aster, 275 F.2d 281 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960)	4
United States v. Florida, 615 F.2d 1370 (5th Cir. 1980)	4, 5
United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949)	3, 4
United States ex rel. Joseph v. Cannon, 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 85 (1982)	5
United States ex rel. Vance v. Westinghouse Electric Corp., 363 F. Supp. 1038 (W.D. Pa. 1973)	5
Statutory Provisions:	
False Claims Act, 31 U.S.C. §§ 231 *et seq.* (1976 & Supp. II 1978)	i, 1, 2
31 U.S.C. § 232	i, 2, 3

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Memorandum No. 80-4312, February 26, 1982) (Pet. App. A22)[1] is unpublished. The opinion of the United States District Court for the District of Hawaii (Pet. App. A1) is reported at 490 F. Supp. 244 (D. Hawaii 1980).

STATUTORY PROVISIONS INVOLVED

The False Claims Act, 31 U.S.C. §§ 231 *et seq.*, provides in relevant part:

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[1] Citations to "Pet. App." refer to the appendix to the petition for writ of certiorari filed by petitioner Jake Lapin.

"(A) The . . . district courts of the United States, . . . shall . . . have full power and jurisdiction to hear, try, and determine such [False Claim Act] suit."

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States . . . ."

"(C) . . . The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: . . ."

31 U.S.C. § 232.

STATEMENT

In a memorandum decision, the court below upheld the judgment of the United States District Court for the District of Hawaii that it was without jurisdiction under the False Claims Act ("the Act") (31 U.S.C. §§ 231 *et seq.*), over a *qui tam* suit based upon evidence and information that the plaintiff had disclosed to the government before he filed suit. The controversy arose as follows:

For a number of years IBM and the General Services Administration have negotiated and entered into annual contracts governing the acquisition by government agencies of IBM automatic data processing equipment. (Pet. App. A3.) Under those contracts, equipment rented to the government is subject to a 30-day successful performance period before rent is due. (Pet. App. A3-A4.) Nonetheless, the contracts permit IBM to bill for the rental equipment from the date of installation, subject to a credit if completion of the successful performance period is delayed. (*Id.*)

Petitioner, purporting to act on behalf of himself and the United States, filed a *qui tam* suit against IBM under

the Act claiming that rental invoices submitted by IBM before completion of the successful performance period constituted false claims within the meaning of the statute. (Pet. App. A5.) In his pleadings and memoranda to the district court, petitioner averred that before bringing suit he had advised officials at the Department of Justice, the General Services Administration and the General Accounting Office, of his evidence and information. (See Pet. App. A4.) He acknowledged that his suit was based upon evidence or information in the possession of the United States at the time it was brought, that he had decided to give his information to the United States for its use rather than first bringing an action on his own initiative, and that he had obtained the information needed to bring this suit by reasons of his government employment. (Pet. App. A3, A10.)

IBM moved to dismiss the action on the ground that the suit was "based upon evidence or information in the possession of the United States . . . at the time such suit was brought." (31 U.S.C. § 232(C).)[2] The district court found that petitioner had made no allegation that his suit was based upon information beyond what he gave to the government before he filed suit. The court recognized the exception to the jurisdictional bar in the case of an honest informer who reports false claim information to a dishonest government official (*United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949)), but declined to invoke the exception because nothing in the record suggested that there was any ground for doing so. (Pet. App. A17.) Accordingly, it granted IBM's motion, holding that section 232(C) deprived it of jurisdiction. Petitioner appealed, and the Court of Appeals for the Ninth Circuit affirmed,

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[2] The United States, which has a right to take over and prosecute a case begun by a *qui tam* plaintiff, 31 U.S.C. § 232(C), declined to appear in the action, advised the district court it could protect its rights "under the contract and through administrative channels," and indicated that the court lacked subject matter jurisdiction of petitioner's action. (Pet. App. A7.) The district court's judgment dismissing the action expressly stated that it was without prejudice to the government's rights. (Pet. App. A21.)

holding that the district court had properly dismissed the action for lack of subject matter jurisdiction. (Pet. App. A21.)

ARGUMENT

Review of this case is not warranted. The decision below satisfies none of the criteria for the exercise of certiorari jurisdiction and, in any event, is plainly correct.

The only reason advanced in support of a grant of certiorari is a purported conflict among the courts of appeal on the question of jurisdiction over *qui tam* suits. There is no conflict; all the courts of appeal that have considered the issue have held that the statute is unambiguous and deprives the court of jurisdiction whenever—as is the case here—the information upon which the suit was based was in the possession of the government, even though the *qui tam* plaintiff was the source of the government's information. *United States v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980); *Safir v. Blackwell*, 579 F.2d 742, 746-47 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978); *United States v. Aster*, 275 F.2d 281, 283 (3d Cir.), *cert. denied*, 364 U.S. 894 (1960).

As the district court found, there was neither any contention nor any factual basis for invoking the exception noted in *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949). (Pet. App. A17.) That exception—that evidence in the hands of a government official who is involved in a scheme to defraud the government will not defeat jurisdiction—is based on the well-accepted rule that "knowledge of an agent who is engaged in an attempt to defraud his principal will not be imputed to the principal," 178 F.2d at 737, and is consistent with the statutory language and other case law. Nor, as the district court found, was this a case where the government possessed some evidence or information before suit was

filed, and the *qui tam* plaintiff claimed to have additional information. (Pet. App. A18.) *See, e.g., United States ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1630 (1982); *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F. Supp. 1038 (W.D. Pa. 1973). Here, as the court below observed, the government had sufficient evidence and information before the suit was filed "to enable it adequately to investigate the case and to make a decision whether to prosecute." (Pet. App. A24, citing *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d at 674. *See also, United States v. Florida*, 615 F.2d at 1371.) Finally, the soundness of the decisions below and the lack of merit of the petition are further shown by the fact that the information on which the suit was based was in the government's possession because petitioner obtained it by reason of his government employment. (Pet. App. A7.) The statute, therefore, deprived the district court of subject matter jurisdiction over the suit, and the court of appeals correctly affirmed its judgment of dismissal.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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